In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1195

HEXAGON LABORATORIES, INC., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this action in the Court of Claims against the United States to recover the difference between the contract price and the world market price of surplus quinine sulfate powder which the United States had contracted to sell to it. The contract, entered into on March 22, 1962, provided that the petitioner was to take delivery of the quinine powder in the five succeeding years. The contract contained the following standard clause — Number 11 — regarding the government's liability (Pet. App. 26):

> LIMITATION ON GOVERNMENT'S LIABILITY. * * * the measure of the Government's liability in any case where liability of

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> the Government to the Purchaser has been established shall not exceed refund of such portion of the purchase price as the Government may have received.

Under the direction of the Director of the Office of Emergency Planning (see Def. Exh. 6),[1] the General Services Administration cancelled the contract in September 1964. This was done because, after the execution of the contract, the Department of Defense discovered that, while quinine had previously been thought to have become obsolete in the treatment of malaria, "[d]uring the past year there has been increasing evidence of the existence, in certain areas of the world, of strains of the malaria parasite which are immune to all known drugs except natural quinine. The principal area involved is Southeast Asia. Quinine is being returned to use in the military supply system after an absence of many years" (Def. Exh. 10).

On the motion of the United States for summary judgment, the Court of Claims held that the plaintiff's recovery for breach of contract was limited by clause Number 11, *supra,* to the refund of the purchase price which the government had received. In two previous cases, *Freedman* v. *United States,* 320 F. 2d 359, 362 and *Benjamin* v. *United States,* 348 F. 2d 502, 520 (Pet. App. 13), the court had held that this contractual provision was inserted into the Standard Sales form agreement in part "to meet those instances

[1] "Def. Exh." refers to the Exhibits attached to the motion for summary judgment filed in the Court of Claims and included in the Record before this Court.

in which * * * a need for the property develops after it has been declared surplus and offered for sale" (*Freedman, supra,* 320 F. 2d at 362). Since the court found that there was "no litigable issue as to the reality of the [government's] need" here (Pet. App. 13), it granted the government's motion.

The court correctly applied the express terms of clause Number 11 of the contract to limit the government's liability, in the event of a cancellation of the contract, to a refund of the purchase price. As the court held, such provisions are clearly applicable in circumstances like those in this case, where unanticipated military needs necessitated termination of the contract to conserve the quinine supply. See *North & Judd Mfg. Co.* v. *United States,* 84 F. Supp. 649, 650, where the court applied a provision similar to the one in this case to confine the government's liability where a contract for the sale of surplus steel had been cancelled because the "steel was urgently needed to meet unpredictable requirements for rifle clips; that is to say, army requirements which were not predictable at the time the steel was declared to be surplus property." See also *Erie Coal Co.* v. *United States,* 266 U.S. 518, 520–521; *United States* v. *Weisbrod,* 202 F. 2d 629, 632–633 (C.A. 7), certiorari denied, 346 U.S. 819; *Freedman* v. *United States,* 320 F. 2d 359, 362 (Ct. Cl.).

Nor is there substance to petitioner's contention that, contrary to the view of the Director of the Office of Emergency Planning, there was insufficient need to cancel the contract because the United States could have met defense requirements on the open mar-

ket, although at a price higher than the contract price (Pet. 4, 6). The record shows that there was, in fact, no adequate available supply of quinine to satisfy the requirements of the National Stockpile caused by the crisis in Southeast Asia. In March, 1965, shortly after the contract in this case was cancelled, the Department of Defense was unable to find quinine available from commercial sources in the United States to meet an urgent demand for military purposes (Def. Exh. 8), and the President consequently authorized the release of 150,000 ounces of quinine from the National Stockpile for use by the Department of Defense (Def. Exh. 12). There is therefore no occasion to review the factual finding of the Court of Claims that petitioner "has raised no litigable issue as to the reality of" the government's need (Pet. App. 13).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1966.